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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mikkel Jordahl; Mikkel (Mik) Jordahl, P.C.,

Plaintiffs,

v.

Mark Brnovich, Arizona Attorney General; Jim
Driscoll, Coconino County Sheriff; Matt Ryan,
Coconino County Jail District Board of Directors
Member; Lena Fowler, Coconino County Jail
District Board of Directors Member; Elizabeth
Archuleta, Coconino County Jail District Board of
Directors Member; Art Babbott, Coconino County
Jail District Board of Directors Member; Jim Parks,
Coconino County Jail District Board of Directors
Member, all in their official capacities,

Defendants.

No. 3:17-cv-08263-PCT-DJH

**PLAINTIFFS' RESPONSE TO
STATE'S NOTICE OF
SUPPLEMENTAL AUTHORITY**

1 Plaintiffs respectfully respond to the State’s notice of supplemental authority, Doc. 61,
 2 which addressed (1) the release of an updated Arizona Agency Handbook by the Arizona
 3 Attorney General’s Office; and (2) the dismissal of *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D.
 4 Kan. 2018), pursuant to settlement of the case. Neither of these post-argument developments
 5 affects the issues before the Court.

6 **Agency Handbook:** The guidance contained in the Arizona Agency Handbook has no
 7 bearing here for three reasons. First, the Handbook does nothing to change the fact that, in order
 8 to contract with Coconino County, Mr. Jordahl must certify that his Firm will not participate in a
 9 boycott of Israel or territories controlled by Israel; that Mr. Jordahl still refuses to sign that
 10 certification; and that he is therefore still being denied compensation for the legal services he
 11 performs for Coconino County. Doc. 39 at 11–13. Those facts alone establish Plaintiffs’
 12 compelled speech claim. *Id.* at 12–13; *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971).

13 Second, like the arguments transposed from the State’s legal briefs, the Handbook’s
 14 purported clarifying definitions of “company” and “boycott of Israel” are inconsistent with the
 15 plain language of the statute, too vague to provide adequate notice as to what boycott actions are
 16 prohibited, and inapplicable to Plaintiffs’ boycott activity. Doc. 39 at 13–16. Plaintiffs wish to
 17 participate in a BDS boycott of companies supporting Israel’s occupation of the Palestinian
 18 territories, including all companies operating in Israeli settlements in the West Bank. *Id.* at 13.
 19 Plaintiffs’ boycott is in compliance with or adherence to calls for boycott by Jewish Voice for
 20 Peace, the Evangelical Lutheran Church in America, and a number of other BDS group. *See id.*
 21 Thus, the Handbook has no effect on Plaintiffs’ claims.

22 Finally, as the State’s own cited authority points out, “Opinions of the Attorney General
 23 are advisory, and are not binding.” *Ruiz v. Hall*, 191 Ariz. 441, 449 (1998); *accord Marston’s*
 24 *Inc. v. Roman Catholic Church of Phoenix*, 132 Ariz. 90, 94 (1982). Moreover, these cases
 25 apply to formal Attorney General opinions, which the Attorney General may not issue *sua*
 26 *sponte* or in response to a request from a private citizen. *See* Doc. 58 at 2. Even if agencies and
 27 political subdivisions may rely on the guidance offered by the Handbook, they are by no means
 28

1 required to do so. Indeed, the Attorney General himself could change the Handbook if he so
2 chooses. “[P]recedent warns against accepting as ‘authoritative’ an Attorney General’s
3 interpretation of state law” under such circumstances. *Stenberg v. Carhart*, 530 U.S. 914, 940
4 (2000) (citation omitted)). Otherwise, Plaintiffs’ and other state contractors’ First Amendment
5 rights would be placed “‘at the sufferance of’ [Arizona’s] Attorney General.” *Vt. Right to Life*
6 *Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (citation omitted) (collecting cases).

7 **Koontz Dismissal:** *Koontz* was dismissed pursuant to settlement after the state legislature
8 amended the law such that it no longer applies to Ms. Koontz. Specifically, the law now requires
9 companies to sign the anti-boycott certification only if they have a contract with the state “with
10 an aggregate price of more than \$100,000.” K.S.A. 75-3740e(b). Because Ms. Koontz was
11 contracting with the state solely in her individual capacity, and because her contract was not
12 worth more than \$100,000, *see Koontz*, 283 F. Supp. 3d at 1013–14, she is no longer required to
13 sign Kansas’s anti-boycott certification. Here, on the other hand, Plaintiffs are indisputably
14 required to sign Arizona’s anti-boycott certification in order for Mr. Jordahl’s Firm to contract
15 with Coconino County. Doc. 39 at 11–12. Thus, the dismissal in *Koontz* has no bearing on the
16 facts at issue here, or on the persuasiveness of the *Koontz* court’s reasoned, published opinion.

Respectfully submitted this 14th day of September, 2018.

By: /s/ Brian Hauss

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties.

/s/ Brian Hauss